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No. 120

Court, U.S.
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In The

Supreme Court of the United States

No. 1005 October Term, 1957

JONES MOTOR CO., INC.,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

and

HIGHWAY EXPRESS LINES, INC.,
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Where a trucking company is actively operating between two points in Pennsylvania, by way of New Jersey, without any justification and solely as a subterfuge, and where specific authorization for same has not been obtained from the Interstate Commerce Commission, may the State Public Utility Commission order such carrier to cease and desist until a certificate of public convenience is secured from it?

Answered by the Pennsylvania Superior Court in the affirmative.

COUNTER-STATEMENT OF THE CASE

Petitioner in its Statement of the Case makes the following misstatement: "In addition, interstate interline traffic to and from other carriers and traffic destined to points on the specified routes, not situated in Pennsylvania, likewise is handled."

The facts in this instance involve 22 shipments from or to the Allentown area and Philadelphia area. Petitioner candidly admitted that all the shipments in this case moved in trucks which carried no state-to-state transportation and that no stops, deliveries or pick-ups were made in New Jersey (R. 161a, 217a-218a).

These are the findings made by the Pennsylvania Public Utility Commission and the Pennsylvania Superior Court on the basis of the Petitioner's admission. What Petitioner might do in other instances not involved in the present case is not before your Honorable Court. The Pennsylvania Public Utility Commission therefore takes objection to Petitioner's statement concerning "interstate interline traffic."

ARGUMENT

THE PENNSYLVANIA SUPERIOR COURT PROPERLY FOUND THAT PETITIONER WAS OPERATING BETWEEN POINTS IN PENNSYLVANIA SOLELY AS A SUBTERFUGE WITHOUT SPECIFIC AUTHORIZATION FROM THE INTERSTATE COMMERCE COMMISSION. THE PETITION FOR A WRIT OF CERTIORARI SHOULD THEREFORE BE DENIED

I. The Commonwealth of Pennsylvania Is Not Precluded From Exercising Jurisdiction in the Absence of Specific Action by the Interstate Commerce Commission

The decision of the Pennsylvania Superior Court requiring Jones Motor Co., Inc., Petitioner, to obtain a certificate of public convenience from the Pennsylvania Public Utility Commission was supported by substantial evidence and did not conflict with any certificate issued by the Interstate Commerce Commission (I.C.C.). Petitioner does not assail the sufficiency of the evidence but argues that the Commonwealth of Pennsylvania is precluded from acting under its accepted and recognized powers because of the certificate of public convenience and necessity issued to the Petitioner by the Interstate Commerce Commission.

The accommodation of the federal and state authorities in their respective spheres of government has constantly been a delicate determination of power,

based upon the necessities of the given situation and the respective interests of each sovereignty. As applied to this case the rule may be stated that in the absence of a direct conflict with the federal authority, the state is free to regulate under its traditional and accepted reserved powers secured to it by the Constitution.

The basis of state action in the instant case was that the Pennsylvania Public Utility Commission found that the petitioner has been circuitously routing its transportation through New Jersey to avoid the certificate requirements of the Pennsylvania Public Utility Law.[1]

As will hereinafter be adverted to, the evidence contained in the record clearly demonstrated that Petitioner's operations were intended as a subterfuge. Since the Pennsylvania Commission's order did not conflict with federal authority, it is clear under the decision in *Eichholz v. P.S.C.*, 306 U.S. 268, 622, 59 S. Ct. 532, 83 L. Ed. 641 (1938), that the state action involved in the instant case was unquestionably within the jurisdiction of the state agency.

The basic question, as heretofore stated, is whether Petitioner's I.C.C. certificate completely ousts the jurisdiction of the Commonwealth of Pennsylvania. We agree that the Interstate Commerce Commission is supreme when it acts, and that any state action in conflict with the expressed action of that body would

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[1] Section 202(c) of the Act of May 28, 1937, P.L. 1053, 66 P.S. §1122(c). See Statutes Involved set forth on page 5 of Petition, for text. A public utility is defined by Section 2 (17)(c), 66 P.S. §1102(17)(c), as any person or corporation "transporting passengers or property as a common carrier."

be invalid: In the instant case, four Commissioners of the Pennsylvania Public Utility Commission, the seven judges of the Superior Court of the Commonwealth of Pennsylvania, and apparently, the seven Judges of the Supreme Court of the Commonwealth of Pennsylvania, who have all passed upon this matter, have unanimously concluded that the action taken by the Interstate Commerce Commission, as set forth in the Petitioner's I.C.C. certificates, does not expressly nor by necessary inference oust the traditional jurisdiction of this State in the type of regulation sought to be imposed upon the Petitioner.

A. The limits of Petitioner's I.C.C. certificates.

The Pennsylvania Public Utility Commission found that the Petitioner was actively engaged in trucking operations between the Philadelphia area and the Allentown area, points which are wholly within the Commonwealth of Pennsylvania. It is **conceded** that the I.C.C. certificates possessed by Petitioner do not *expressly* authorize transportation between these two areas in Pennsylvania. If such specific authorization existed, the jurisdiction of the Commonwealth of Pennsylvania over Petitioner's operations would be foreclosed and precluded. Petitioner's rights from the Interstate Commerce Commission, however, authorize no such transportation.

The Pennsylvania Superior Court accurately stated Petitioner's authority in its opinion. Petitioner holds two separate certificates. One, MC-4963, acquired on March 8, 1943, authorizes Petitioner to transport commodities "from Philadelphia over U. S. Highway 1 to New York and return over the same route," with

ancillary carrier service "to and from off route points . . . in that part of New Jersey within 35 miles of Princeton . . ." The second certificate, MC-4963, Sub 7, acquired March 4, 1953, authorizes Petitioner to operate "between Allentown, Pa., and Elizabeth, N. J. over U. S. Highway 22 to junction New Jersey Highway 28" and return over the same route. Under this certificate, service was authorized "to and from all intermediate points and off route points . . . in Pennsylvania within 25 miles of Allentown."

The Commonwealth of Pennsylvania, through its administrative and judicial tribunals, has scrutinized the foregoing certificates and has failed to find any specific authorization for the type of transportation which Petitioner was conducting within the confines of the Commonwealth of Pennsylvania in this case. These two I.C.C. certificates are clear and proper. One authorizes transportation from Philadelphia to New York and the other authorizes transportation from a point in Pennsylvania (Allentown) to a point in New Jersey (Elizabeth). From these two certificates Petitioner has attempted to justify a very aggressive trucking operation between the Allentown and Philadelphia areas, non-stop and uninterrupted.

B. The Commonwealth of Pennsylvania can read Petitioner's I.C.C. certificates to determine if there is specific authorization.

The Commonwealth of Pennsylvania has a right to read Petitioner's certificate to determine whether there has been an ouster of its jurisdiction clearly expressed by the Interstate Commerce Commission. Certainly a carrier cannot preclude a state from in-

quiring into a subterfuge of its jurisdiction merely because it raises a specious and untenable claim under its I.C.C. certificates.

The state is often called upon to read and determine the effects of federal action upon its own jurisdiction. The state must look to the federal action, be it in the form of a federal statute, regulation, order of the executive, or administrative tribunal, to ascertain whether the state's traditional scope of jurisdiction has been superseded or pre-empted. For example, the Supreme Court of Pennsylvania in *Commonwealth v. Nelson*, 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956), properly concluded after comparing the Smith Act of Congress with Pennsylvania's own Anti-Sedition Act that federal action had superseded Pennsylvania's right to act in the area and struck down its own state statute. On the other hand, the high court of California in comparing the federal act with its own, erroneously struck down its own statute making it a state crime for an agent or broker to sell tickets for interstate transportation without a license from the Interstate Commerce Commission. *California v. Zook*, 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1948). This procedure of comparison occurs many, many times in matters involving safety appliances, boilers, securities, labor relations, highway regulations, etc. In the instant case the State tribunals looked upon Petitioner's I.C.C. certificates and concluded that there was no ouster.

C. Federal action to supersede state power of regulation must be clearly expressed.

Where a matter ordinarily would be within the competence of the state in assuming jurisdiction, it has

often been enunciated by your Honorable Court that for state authority to be superseded, the federal assumption must clearly appear and nothing must be left to inference or presumption.[2] Any doubt that may exist as to supersession of state jurisdiction must be resolved in favor of state authority. *Corp. Commission of Oklahoma v. Lowe*, 281 U.S. 431, 438, 50 S. Ct. 397, 74 L. Ed. 945 (1930); *Arkansas R.R. Commission v. Chicago, Rock Island & Pac. R.R. Co.*, 274 U.S. 597, 603, 47 S. Ct. 724, 71 L. Ed. 1224 (1927).

It may further be stated in conformity with these fundamental propositions that if the expression of federal assumption is not clear or precise, then the federal government cannot thereby claim any supersession, and the state therefore would have the right to continue to exercise its normal jurisdiction. Under the delicate balance of power between the federal and state governments, the burden is upon the federal authority to clearly and unmistakably manifest its intention.

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[2] *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. 346, 71 S. Ct. 762, 95 L. Ed. 1002 (1950); *California v. Zook*, 336 U.S. 725, 733, 736, 737, 69 S. Ct. 841, 93 L. Ed. 1005 (1948); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947); *North Carolina v. U. S.*, 325 U.S. 507, 511, 65 S. Ct. 1260, 89 L. Ed. 1760 (1945); *Yonkers v. U. S.*, 320 U.S. 685, 690, 691, 64 S. Ct. 327, 88 L. Ed. 400 (1944); *Palmer v. Massachusetts*, 308 U.S. 79, 83-85, 60 S. Ct. 34, 84 L. Ed. 93 (1939); *Townsend v. Yeomans*, 301 U.S. 441, 454, 57 S. Ct. 842, 81 L. Ed. 1210 (1936); *Atchison Ry. v. R.R. Commission*, 283 U.S. 380, 393, 51 S. Ct. 553, 75 L. Ed. 1128 (1930).

II. Since There Is No Clear and Definite Manifestation by the Interstate Commerce Commission, the Instant Case Is Distinguishable From Service Storage and Transfer Company v. Commonwealth of Virginia

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In the instant case there is no such clear expression. For that reason the Commonwealth of Pennsylvania has pursued its traditional authority. On this point alone the case is clearly distinguishable from *Service Storage and Transfer Company v. Commonwealth of Virginia,* recently decided by your Honorable Court on March 30, 1959, and reported in 359 U.S. 171, 79 S. Ct. 714.

The facts in that case, which will be referred to in more detail subsequently, involved an I.C.C. carrier which had been fined by the Commonwealth of Virginia for carrying merchandise between points in Virginia through Bluefield, West Virginia, without a certificate of public convenience and necessity from the State Corporation Commission. The carrier there routed the transportation through Bluefield, West Virginia, because it maintained its main terminal there and used that terminal as a redistribution center for its entire transportation system. After reviewing the carrier's transportation system, your Honorable Court described the carrier's operations through Bluefield, West Virginia, as "practical, efficient, and profitable." However, in that case, aside from the fact that there was no evidence of "subterfuge," the carrier's certificate from the I.C.C. *expressly* covered the operations under question.

The I.C.C. certificate was quoted by your Honorable Court in its opinion, and it read in part:

> "Between Bluefield, Va., and *points and places within five miles of Bluefield, Va.* and those within five miles of Bluefield, W. Va., respectively, on the one hand, and, on the other, *points and places in that part of Virginia* and West Virginia *within 75 miles* of that territory." (Italics added.)

Your Honorable Court stated in its opinion "The certificate on its face covers the whole operation." There was no question but that the certificate by express language covered the operations under attack by the Commonwealth of Virginia. To further show express authorization from the Interstate Commerce Commission, your Honorable Court referred to a prior unpublished report of the Interstate Commerce Commission issued in 1953 in which the "I.C.C. expressly approved the very type of operation now being carried on." The report of the I.C.C. also showed that the I.C.C. had expressly authorized the carrier to utilize Bluefield, West Virginia as a "gateway". (See *Service Storage and Transfer Company, Inc.*, 59 M.C.C. 803.) Your Honorable Court also referred to an opinion issued by the I.C.C. and reported in 71 M.C.C. 304, in which the Commission upon petition by the carrier for a declaratory order expressly "construed petitioner's certificate as authorizing Virginia-to-Virginia traffic routed through Bluefield, West Virginia."

Ignoring the express language in the carrier's I.C.C. certificate, the unpublished report of the I.C.C. as heretofore related, and the published opinion of the I.C.C. in 71 M.C.C. 304, the Commonwealth of Virginia

proceeded to redetermine the good faith of the carrier's operations. In the instant case there has been no such ouster. The language of Petitioner's certificates does not afford authority or justification for the point-to-point transportation engaged in by Petitioner. There has been no report or opinion by the I.C.C. holding that Petitioner may engage in the operations in question without regard to Pennsylvania law. There has not been any plain and unequivocal expression of authorization from the I.C.C. in this case as there was in the Service Storage case.

Petitioner, of course, is bound by the clear and plain language of its certificate. Petitioner cannot attempt to enlarge its scope of authority by reference to reports or matters outside the terms of its certificate. The certificate is the final judgment in the matter and in the absence of ambiguity or clerical errors represents the complete scope of authorization. See, *eg.*, *Bingler Vacation Tours v. U. S.*, 132 F. Supp. 793, 796 (D. N.J. 1955), affirmed, 350 U.S. 921, 76 S. Ct. 211, 100 L. Ed. 806 (1955);[3] *U. S. v. Rock Island Motor Transit Co.*, 340 U.S. 419, 447, 71 S. Ct. 382, 95 L. Ed. 391 (1952); rehearing denied, 341 U.S. 906, 71 S. Ct. 609, 951 L. Ed. 1344; *U. S. v. Seatrain Lines, Inc.*, 329 U.S. 424, 432, 67 S. Ct. 435, 91 L. Ed. 396 (1947); *Smith Bros. Revocation*, 33 M.C.C. 465, 472 (1942).

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[3] In the Bingler Vacation Tours case, headnote No. 2 reads: "Where bus company's certificate is not ambiguous, authorization afforded by certificate could be determined only by construing language of certificate itself and operations upon which certificate had been granted could not be considered."

A. Petitioner's claim that the report of the I.C.C. at MC-F-4955 (preceding the certificate at MC-4963, Sub. No. 7) authorizes its operations is entirely fallacious.

Although Petitioner would have no right to rely upon an antecedent report of the I.C.C. in this case, because Petitioner adverts to it for support, we shall point out wherein Petitioner's reliance thereon is misplaced. The report was rendered in an application proceeding docketed MC-F-4955 involving a transfer of rights from Clinton Motor Express to Petitioner. The final certificate issued therein is now known as MC-4963, Sub. No. 7. The rights possessed by Clinton Motor Express were known under the docket number of MC-108161. The I.C.C. noted in that report that the rights to be transferred covered regular routes and irregular routes between the Allentown area and the New York Commercial Zone. While the vendor (Clinton Motor Express) could not combine its routes, the I.C.C. decided that Petitioner should have that right and in Petitioner's certificate (MC-4963, Sub. No. 7) that right is given with duplications eliminated. On Sheet 4 of the report the I.C.C. concluded that the combination of such routes should be allowed, and stated:

> "Under the unified rights, vendee (Petitioner) would have authority to transport general commodities over regular routes and, in truckload lots, over irregular routes between Allentown and points in Pennsylvania within 25 miles thereof, on the one hand, and, on the other, points in the New York commercial zone. It appears unlikely that any real distinction could be maintained by vendee

in its regular- and irregular-route operations between those points."

The I.C.C. also said in its report in concluding to allow the combination as aforesaid:

> "Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to operate under the operating rights granted in *No. MC-108161,* which rights are herein authorized to be unified with rights otherwise confirmed in *it* and to be embraced in a certificate in its name, with duplications eliminated." (Italics added.)

It is, of course, clear from this that the unification allowed by the I.C.C. was that pertaining to the rights at No. MC-108161 (Clinton's certificate), namely, the regular and irregular routes. There was no expression by which it can be inferred that the I.C.C. authorized Petitioner to combine its rights contained in No. MC-108161 with its prior rights at MC-4963.

B. Petitioner has an adequate remedy of which it has not availed itself.

In the Service Storage and Transfer case, the carrier had applied to the I.C.C. for a specific ruling on the propriety of its operations. The Commonwealth of Virgina did not even enter an appearance before the I.C.C. to present its view. The I.C.C. reaffirmed its prior opinions in that case and specifically authorized and approved the carrier's operations. See 71 M.C.C. 304.

In the instant case Petitioner has obtained no such decision from the I.C.C. and has not made an attempt

to obtain such a ruling. If Petitioner is really certain of its position, it would have been an easy matter for it to have obtained a clear and unambiguous decision from the Interstate Commerce Commission as Service Storage and Transfer Company, Inc. did in the Service Storage case.

The law is clear that "no one is entitled to judicial relief until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Corp.*, 303 U. S. 41, 50, 51, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1937); *Pittsburgh & W. Va. Ry. Co. v. I.C.C.*, 280 F. 1014 (App. D.C. 1922).

If an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy should be pursued.

Allen v. Grand Central Aircraft Co., 347 U.S. 535, 553, 74 S. Ct. 745, 98 L. Ed. 933 (1954);

Aircraft & Diesel Equipment Corp. v. Hersch, 331 U.S. 752, 767-773, 67 S. Ct. 1493, 91 L. Ed. 1796 (1947);

Macauley v. Waterman S. S. Corp., 327 U.S. 540, 543, 544, 66 S. Ct. 712, 90 L. Ed. 839 (1946).

Since Petitioner has an adequate remedy which it has not availed itself of, the respondent herein respectfully requests your Honorable Court to deny the Petition for the Writ of Certiorari in this case. The matter is not ripe at this stage. Should Petitioner be successful in obtaining a specific I.C.C. ruling in its favor and if, further, the Comonwealth of Pennsylvania fails to recognize such authorization, then there will be time

enough for Petitioner to assert a claim for relief in the courts. However, until then, state jurisdiction may not be ceded away or overridden by speculation of ambiguous reasoning.

C. Section 204(c), 49 U.S.C. §304(c) does not bar the exercise of state jurisdiction in this case.

Your Honorable Court has indicated that a state may apply to the Interstate Commerce Commission under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c) for relief. This section is certainly an avenue open to the states. However, jurisdiction is a question of power, and a power which a state has cannot be taken away unless its jurisdiction has been superseded by express language by the federal government. To hold that a state has no right to assert its own jurisdiction merely because there is another avenue of appeal would be the promulgation of a new and dangerous doctrine and one that would be at odds with the long line of firm and well-established decisions of your Honorable Court. This would be tantamount to precluding state jurisdiction by inference or presumption. Certainly, it was never intended by the Congress that Section 204(c) was to have that effect.

There is, of course, nothing in the language of your Honorable Court's opinion in the Service Storage case that would suggest such a result.

D. The Interstate Commerce Act requires specific authorization.

The Interstate Commerce Act provides that the I.C.C. certificate of public convenience and necessity

specify the fixed termini between which the carrier is authorized to operate. In Section 207, 49 U.S.C. §307, it is written:

> ". . . no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over *other than a regular route or routes, and between fixed termini*, except as such carriers may be authorized to engage in special or charter operations.".

Section 208, 49 U.S.C. §308, further provides:

> "Any certificate issued under section 306 or 307 of this title *shall specify* the service to be rendered and the routes over which, *the fixed termini*, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate."

The I.C.C. has expressed itself in Petitioner's certificates in clear language. It has specified transportation between Philadelphia and New York in one certificate and between Allentown, Pa., and Elizabeth, N. J., in another. Not a word is mentioned about transportation between Philadelphia and Allentown. It would certainly have been simple enough in pursuance of the sections quoted above in the Interstate Commerce Act for the Commission to have stated that Petitioner is authorized to serve between the fixed termini of Philadelphia and Allentown. No such language was used nor can any such intention be inferred or gleaned from the wording of Petitioner's I.C.C. certificates.

III. Petitioner Cannot by Tacking or Combining Its Rights Create Lawful Interstate Carriage To Evade State Regulation

What Petitioner has attempted to do in the instant case has been to combine certain parts of its I.C.C. certificates and put them together in such a fashion as to create a completely new and different right, to wit, the right to carry freight between the Philadelphia and Allentown areas.

Such a right to create interstate commerce in this manner has been questioned by your Honorable Court. In the Service Storage case, your Honorable Court, in re-emphasizing the meaning of the Eichholz case, stated: "There Missouri revoked a carrier's interstate permit because it crossed state lines into Kansas City, Kansas, for the sole purpose of creating an interstate operation."

In this case, Petitioner, by tacking, has attempted to create interstate commerce. This is what the Pennsylvania Public Utility Commission and Pennsylvania's appellate courts found objectionable.

The Interstate Commerce Act requires that all applicants seeking to render service as a common carrier by motor vehicle prove "present or future public convenience and necessity". Section 207, 49 U.S.C. §307. The legislative history is clear that this section was patterned after the motor carrier laws of the 46 states which had the same language. One of the committee members even stated to the legislators that

while different language would be more desirable, yet because of the well-defined meaning accorded to such language by the various states, it would be wise to incorporate that language the way it presently appears in the various state laws.

Yet, it is conceded that **Petitioner has never proved need or necessity for the transportation involved between Philadelphia and Allentown either before the Interstate Commerce Commission or the Pennsylvania Public Utility Commission.** Petitioner attempted to prove necessity for such transportation before the Pennsylvania Public Utility Commission but was unsuccessful. See *Modern Transfer Co. v. Pa. P.U.C.*, 179 Pa. Superior Ct. 46, 115 A. 2d 887 (1955).

Without proving necessity as required by the Interstate Commerce Act, Petitioner seeks to tack or combine its rights without let or hindrance. The validity of the doctrine of "tacking" as applied by the Interstate Commerce Commission has never been passed upon by your Honorable Court. And, of course, it would seem that if the "necessity" section of the Interstate Commerce Act was patterned after the laws of the various states, the I.C.C. should have rejected the doctrine of tacking as has been the unanimous decision of all the states considering the problem. See footnote 4.

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[4] California: *Re Western Motor Transport Co.*, PUR 1922 C. 12, 17; *In re California Transit Co.*, PUR 1923 A. 225; *Re Highway Transport Co.*, PUR 1926 B. 172, 182, 183; *Motor Service Express v. Baker*, PUR 1928 C. 531, 534-35.

Florida: *Central Truck Lines v. R.R. Commission*, 27 So. 2d 658; *Central Truck Lines, Inc. v. R.R. Commission*, 118 Fla. 555, 160 So. 26, 30 (1935); *Re St. Johns River Line Co.*, 7 PUR (NS) 268, 273 (1934).

It is not necessary in this case to rule upon the validity of the doctrine of "tacking"[5] since it is clear that Petitioner, even assuming its validity, may not utilize it here to evade state jurisdiction. Furthermore, a decision is not necessary on this point in view of Petitioner's failure to exhaust its administrative remedies.

Kentucky: *Hazard-Hyden Bus Co. v. Black*, 301 Ky. 426, 192 S.W. 2d 195, 196 (1946); *Eastridge v. Southeastern Greyhound Lines et al.*, 280 Ky. 392, 133 S.W. 2d 95, 97, 98 (1939).

Michigan: *Michigan Express v. Michigan P.S.C.*, 333 Mich. 101, 52 N.W. 2d 616, 619 (1952).

New York: *Yonkers R. Co. v. Hume*, PUR 1929 C, 665, 670, 225 App. Div. 313, 233 N.Y.S. 63 (1929).

North Carolina: *Re Youngblood Truck Lines, Inc.*, 18 PUR 3d 475, 484, 493, 494 (1957).

Ohio: *Pa. R.R. Co. v. P.U.C. of Ohio*, 116 Ohio St. 80, 155 N.E. 694, 697, 698 (1927)

Oklahoma: *Enid Transfer & Storage Co., Inc. v. State et al.*, 201 Okla. 274, 190 P. 2d 150, 152, 73 PUR(NS) 167 (1947).

Pennsylvania: *Lancaster Transportation Co. v. Pa. P.U.C.*, 169 Pa. Superior Ct. 284, 293, 82 A. 2d 291 (1951).

Texas: *Sunset Express, Inc. v. Gulf, C. & S. F. Ry. Co.*, Tex. Civ. App., 154 S.W. 2d 860, 863, 864 (1941); *R.R. Commission of Texas v. Red Arrow Freight Lines, Inc.*, Tex. Civ. App., 96 S.W. 2d 735, 738 (1936).

Washington: *North Bend Stage Line v. Washington M. Coach Co., Inc.*, 80 PUR(NS) 248, 254 (1949); *State v. Dept. of Transp.*, 26 Wash. 485, 174 P. 2d 516, 522 (1946).

Wyoming: *Application of Calhoun*, 51 Wyo. 448, 68 P. 2d 591 (1937).

[5] Even the doctrine of tacking, as evolved by the I.C.C. has been difficult to fathom for the experts. See the recent articles of Robert J. Bernard, "Tacking or Combining Interstate Operating Rights," Volume 26, I.C.C. Practitioners Journal, February 19, 19[illegible], page 521.

Whatever may be the arguments for "tacking" in promoting greater service in interstate commerce, by no sfretch of the imagination can it be utilized to create interstate commerce and evade the jurisdiction of the state involved over a matter which is essentially intrastate in nature. That the type of transportation involved in this case is basically intrastate in nature can be seen from the following excerpt in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 666-668, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948), with which neither the majority or minority disagreed:

> "From the standpoint of physical movement, there is a crossing of state lines and a journey over territory belonging to more states than one—a movement that is undeniably interstate. At the same time, however, the business of transporting passengers or freight between points in the same state is essentially local in character despite the interstate movement. All of the essential elements of the commercial intercourse represented by the continuous transportation are resident in that one state. The parties to the transportation contract, the making of the contract, and the service which is the subject of the contract are identified preeminently with that state. The whole purpose of the transaction is to transport the passengers or freight to a point within the same state as the point of origin. Passage through another state is a mere geographical incident in the consummation of this local transaction." (334 U. S. at 666.)

See also *Spector Motor Service v. O'Connor*, 340 U.S. 602, 610, 71 S. Ct. 508, 95 L. Ed. (1951).

"The sponsors of tacking never envisaged such results nor advocated that viewpoint. Tacking can only be used, if at all, to permit the interchange of shipments that already were (rather than thus became) interstate in nature. Tacking can certainly not be interpreted to be a tool to evade state license requirements when the whole purpose of the Federal Motor Carrier Act of 1935 was to fill the gaps between state and federal relations and when many of the sections of that Act contain assertions of federal-state cooperation and coordination.

For example, the National Transportation Policy set forth in the Federal Motor Carrier Act of 1935 (see 49 U.S.C. note preceding §301) states that one of the purposes of the Act is "to cooperate with the several States and the duly authorized officials thereof." Section 203 (b)(8), 49 U.S.C. §303(b)(8), makes that section applicable only if the motor carrier is "lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction". Further, Section 204(a)(4), 49 U.S.C. §304(a)(4), provides: "In any case where a motor carrier has become exempt from the provisions of this chapter as provided in this subparagraph, it shall not be considered to be a burden on interstate or foreign commerce for a State to regulate such carrier with respect to the operations covered by such exemption." Section 202(b), 49 U.S.C. 302(b), provides: "Nothing in this chapter shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power

of regulation of intrastate commerce by motor carriers on the highways thereof." Section 205, 49 U.S.C. §305, as well as many other sections of the Interstate Commerce Act evidence a clear and palpable desire on the part of the federal government to administer the Federal Motor Carrier Act in a manner complementary to state regulation.

The legislative history bears out the harmonious relationship that was intended by the Federal Motor Carrier Act. One of the Committee members stated on the floor of the House: "Mr. Hardan: Now, Mr. Speaker, the remark has been made that this is a bill for the railroads. This bill is endorsed by every organization of truck carriers that we know of; at least, all the prominent organizations of truck carriers. It protects every interest in the truck business. **It gives the States more rights to control intrastate commerce than they ever had before.** . . ." 79 Cong. Rec. 12197.

Another member stated: "Mr. Sadowski. The State commissions have asked Congress to pass this bill so that there may be **harmony** between States as to motor-carrier regulation. . . ." 79 Cong. Rec. 12204.

The Act is replete with instances manifesting Congressional respect for the dignity of the States in their respective spheres of regulation. To reason that by virtue of the self-created and amorphous doctrine of tacking, traditional state regulation can be defeated, would be to read out of the Federal Motor Carrier Act the underlying purpose behind its creation.[6] It would

[6] In *United States v. Shirey*, 79 S. Ct. 746 (1959), at page 749, your Honorable Court said: "The general purpose is

be tantamount to the states creating a Frankenstein monster which came alive to turn against them to their great harm and detriment.

The doctrine of tacking need not be further explored here. Suffice it to say, that whatever may be its legal status when utilized in a proper manner, it certainly cannot be utilized to evade state requirements. The basis of the decision of the Superior Court of Pennsylvania was simply that—"such tacking cannot supply a carrier with authority to transport property in intrastate commerce."

The Interstate Commerce Commission recognized the same principle in its decision in the Service Storage and Transfer Company case when it said: "In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid state regulation. . . ." 7 M.C.C. 304, 306.

Before leaving the field of "tacking" it may be pointed out that "tacking" is a very insidious doctrine against which the states have very little ability to protect themselves. For example, a motor carrier may apply to the Interestate Commerce Commission for the additional right to go between Philadelphia

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more important aid to the meaning than any rule which grammar or formal logic may lay down."

In *Panhandle Eastern Pipe Line Co. v. Mich. P.S.C.*, 341 U.S. 329, at p. 335, 71 S. Ct. 777, 95 L. Ed. 933 (1951), the Court commented: "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption."

and Burlington, New Jersey. The People of Pennsylvania would have no occasion to enter opposition. The same carrier could later apply for another segment of rights between Allentown and Hackensack, New Jersey. This again would find the people of Pennsylvania without any justifiable complaint. However, subsequently, the carrier may buy certain rights which would contain a route between Burlington, New Jersey, and Hackensack, New Jersey, which route may originate in Delaware and end ultimately in New York. Under the asserted doctrine of "tacking", this carrier would be able to actively carry on transportation between Philadelphia and Allentown by "tacking" the various segments together. Under these circumstances, the people of Pennsylvania and its carriers would be powerless to prevent this insidious process because they would never know the ultimate purpose in the mind of the carrier as each segment was acquired. When the fragments are pieced together allowing the carrier an entirely new and different right, the state directly involved is confronted with a *fait accompli.*

Because of the insidious effects the doctrine of tacking breeds, all the states which have had before it the question of the validity and propriety of tacking have unanimously rejected it. See footnote 4, supra. An excerpt from one such state decision which highlights the problem is given in the footnote.[7]

[7] In *Application of Calhoun*, 51 Wyo. 448, 68 P. 2d 591, 596 (1937), the Court said: "If the contentions of respondents above recited were to prevail, then it is easy to see that an individual or corporation could, by purchasing a number of certificates, each authorizing only local service, forthwith, as

Tacking, such as Petitioner has attempted to employ, if allowed to go unchecked, could readily destroy the efficacy of state regulation entirely and cause irreparable harm to the duly licensed intrastate carriers and the shipping and receiving public, and eventually the general public. The state is faced with undesirable adverse competition. The public is faced with deterioration in the quality of service resulting from duplication of facilities and destructive competition. The tacking carrier is free to limit its operations to the "cream" areas while the duly certified state carrier may have to serve the sparse and desolate areas as well. This diversion of profitable trade from the standard carrier renders the latter less able to fulfill its obligation to the public. The public is, of course, the group that will eventually suffer from the free-wheeling employment of tacking. Moreover, the public is often ignorant of the circuitous route used by the tacking carriers since such carriers usually advertise their service as "direct." The many evils that regulation was instituted to prevent are reappearing and will continue to appear. The vital local interests of the Commonwealth of Pennsylvania in a similar situation were clearly and forcefully recognized by your Honorable Court in *Panhandle Eastern*

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a matter of right, insist that he be permitted to combine them and operate a through service, notwithstanding traffic conditions might be such that if at the time these certificates were granted a through service certificate had been asked for, it would have been refused and properly so. The consequence of upholding contentions of this nature would be that the Public Service Commission of Wyoming would be rendered helpless to guard the interests of the public as contemplated by Chap. 65, Laws of Wyoming 1935."

Pipe Line Co. v. Mich. P.S.C., 341 U. S. 329, 71 S. Ct. 777, 95 L. Ed. 933 (1951), wherein it was said (341 U. S. at 334):

> "Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant asserts a right to compete for the *cream* of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of 'essentially local' concern and of vital interest to the State of Michigan."

The interests of the Commonwealth of Pennsylvania are spelled out in the various provisions of the Pennsylvania Public Utility Law, such as, proof of necessity (§ 203, 66 P.S. § 1123); just and reasonable charges (§ 301, 66 P.S. § 1141); prohibition against discrimination (§304, 66 P.S. §1144); designation of statutory agent for service of process (§ 910, 66 P.S. § 1350); insurance and surety bonds (§ 915, 66 P.S. § 1355); rules and regulations issued by the Pennsylvania Public Utility Commission (§§901, 907, 66 P.S. §§ 1341, 1347).

Petitioner harbors the belief that even though it has been denied the right to ply between Philadelphia and Allentown directly, it can still accomplish this result through the obscure doctrine of tacking. The judges of the Commonwealth of Pennsylvania saw

through this obvious device of subterfuge and refused to sanction it. Petitioner, having failed before the Pennsylvania Public Utility Commission and the two appellate courts in this Commonwealth, is now seeking to persuade your Honorable Court on the highest level of our federal-state judicial structure to license that which has been categorized as a subterfuge. The facts in this case so palpably stamp Petitioner's activities as a subterfuge that the instant case cannot seriously be compared with the recent case of Service Storage and Transfer Company.

IV. The Record Fully and Amply Sustains the Finding of Subterfuge. Service Storage and Transfer Case Further Distinguished

In the case at bar Petitioner had previously applied to the Pennsylvania Public Utility Commission for the right to go directly between Philadelphia and Allentown. When this application was denied, Petitioner vigorously stepped up its "interstate" tacking program to justify intrastate operations. The evidence, however, remained uncontradicted: Petitioner had no terminal in New Jersey. The freight challenged was purely intrastate freight, having both origin and destination points in Pennsylvania. There was no commingling with interstate freight. There was no delivery to a re-distribution center. There were no deliveries in New Jersey. There were no pick-ups in New Jersey. In fact, there were no business stops in New Jersey at all. All the intrastate freight was transported from the Allentown terminal to the Philadelphia terminal in the same truck. There was no tie-up with interstate freight. There was no acceleration or facilitation of the movement of interstate freight connected with Petitioner's transportation. The route through New Jersey was twice as long and took almost twice as much time to traverse. No legitimate reason whatsoever was advanced for the movement of goods through New Jersey other than to create interstate transportation.

On the other hand, the case of Service Storage involved a carrier which had continued the same pat-

tern of operations as its predecessors, which methods were practical and efficient. Service Storage picked up freight in Virginia destined for Virginia points in combination with interstate freight destined for non-Virginia points. In fact, the great majority of freight carried was destined for non-Virginia points. The point-to-point Virginia freight only comprised 3% of the total freight carried by Service Storage. All the traffic thus picked up, was carried to the Bluefield, West Virginia, terminal of Service Storage, where it was unloaded and re-combined with other freight. The West Virginia terminal of Service Storage was not only its main terminal but the hub around which *all* its operations rotated. Freight coming in from all different parts of the country were sorted out and arranged by area so that its operations were prompt and economical. The Virginia point-to-point freight was consolidated with freight coming to the terminal from non-Virginia origins but destined for Virginia. The peddler runs and the over-the-road truck operations were designed to provide fast and efficient service on a geographical basis. Only 3% of all the traffic transported by Service Storage actually consisted of Virginia point-to-point freight. The evidence established that this freight was auxiliary and ancillary to the movement of freight in interstate commerce and was helpful in the making up of full truckload shipments, which tended to expedite and facilitate the flow of interstate merchandise. Your Honorable Court, after analyzing Service's operations, concluded as follows:

> "It stands uncontradicted that its (Service's) operation is not only practical, efficient and

profitable, but also that the creation of this 'flow of traffic' is a time-saver to the shipper since there is less time lost waiting for the making up of a full truckload. It also claims a unique service for less-than-truckload shipments of central Virginians who ship commodities to southwest Virginia and Kentucky who otherwise would suffer long delays on deliveries or would be obliged to ship by special truck at higher rates. While these considerations are not controlling, they throw light on petitioner's claim of bona fides."

No attempt will be made in this brief to belabor the obvious and glaring factual distinctions existing between the Service Storage case and the present one.

Summary and Conclusion

Our position summarized is that the Commonwealth of Pennsylvania can examine the facts to find out whether a carrier is evading its jurisdictional requirements and whether that carrier is doing it as a mere subterfuge or under specific authority from the Interstate Commerce Commission. In the instant case, the Commonwealth of Pennsylvania concluded that the Interstate Commerce Commission had not assumed control over the transportation involved and that Petitioner had undertaken the "intrastate" carriage through New Jersey as a subterfuge. The evidence was overwhelming in establishing subterfuge. Petitioner's self-serving attempt to tack to create interstate commerce must bow to the superior right of the state to protect its local interests. Petitioner further failed to exhaust its additional administrative remedy by applying to the Interstate Commerce Commission as aforesaid.

Your Honorable Court in the past has repeatedly denied petitions for writs of certiorari in similar cases, reaffirming the position of the Commonwealth of Pennsylvania. See *Ryan et al. v. Pa. P.U.C.*, 143 Pa. Superior Ct. 517, 17 A. 2d 637 (1940), certiorari denied, 314 U.S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); *Ryan v. Pa. P.U.C.*, 44 F. Supp. 912 (E. D. Pa. 1942), motion dismissed, 317 U.S. 702, 63 S. Ct. 162, 87 L. Ed. 561 (1942); *Atlantic Freight Lines v. Pa. P.U.C.*, 163 Pa. Superior Ct. 215, 60 A. 2d 589

(1948), certiorari denied, 336 U. S. 925; 69 S. Ct. 656, 93 L. Ed. 937 (1949).

The vitality of the Pennsylvania Ryan case was further strengthened by the citation of that case with approval by your Honorable Court in *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 660, 80 S. Ct. 1260, 92 L. Ed. 633 (1948). The instant case is no different from the facts in these cases.

Wherefore, the respondent prays that your Honorable Court deny Petitioner's petition for a Writ of Certiorari.

And we will ever pray, etc.

Respectfully submitted,

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